

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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Court of Appeals of the District of Columbia

JANUARY TERM, 1932

No. 5641

175

JAMES E. COLLIFLOWER & CO., INC., A
CORPORATION, APPELLANT,

vs.

McCALLUM-SAUBER COMPANY, GARNISHEE,
AND SECURITY SAVINGS & COMMERCIAL
BANK, GARNISHEE.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

FILED MARCH 25, 1932.

PRINTED APRIL 28, 1932.

Court of Appeals of the District of Columbia

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vs.

McCALLUM-SAUBER COMPANY, GARNISHEE,
AND SECURITY SAVINGS & COMMERCIAL
BANK, GARNISHEE, APPELLEES.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

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Court of Appeals of the District of Columbia

No. 5641.

JAMES E. COLLIFLOWER & Co., Inc., a Corporation,
Appellant,

vs.

McCALLUM-SAUBER COMPANY, Garnishee, and SECURITY
SAVINGS & COMMERCIAL BANK, Garnishee.

a Supreme Court of the District of Columbia.

At Law.

No. 79439.

JAMES E. COLLIFLOWER & Co., Inc., a Corporation,
Plaintiff,

vs.

BECK & GUCKERT FLORAL Co., Inc., a Corporation,
Defendant.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

Declaration.

Filed April 3, 1931.

In the Supreme Court of the District of Columbia.

At Law.

No. 79439.

JAMES E. COLLIFLOWER & Co., Inc., a Corporation,
Plaintiff,

v.

BECK & GUCKERT FLORAL Co., Inc., a Corporation,
Defendant.

The plaintiff, James E. Colliflower & Co., Inc. a corporation, complains against the defendant, Beck & Guckert Floral Company, Inc., a corporation, for that heretofore, to-wit, on the 9th day of September, 1930, in an action then pending in the Corporation Court of the City of Alexandria, State of Virginia, a court of record having jurisdiction in the premises, wherein the plaintiff herein was plaintiff and the defendant herein was defendant, the plaintiff recovered a judgment against the defendant for the sum of One Thousand Nine Hundred and Fifty Dollars (\$1,950.00), with interest on \$200.00 thereof from October 21, 1929, and on \$350.00 thereof from December 17, 1929, and on \$1,400.00 thereof from January 27, 1930, at the rate of six per cent per annum (6%) until paid, and the said judgment remains in full force and effect, unsatisfied in whole or in part, unreversed, and not superseded. And the plaintiff — judgment in this action for the sum of \$1,950.00, with interest on \$200.00 thereof from October 21, 1929, and on \$350.00 thereof from December 17, 1929, and on \$1,400.00 thereof — January 27, 1930, at the rate of 6% per annum until paid, besides costs.

LEO P. HARLOW,
MARSHALL H. LYNN,
Attorneys for Plaintiff.

2

Affidavit for Attachment.

Filed April 3, 1931.

* * * * *

DISTRICT OF COLUMBIA, *To wit:*

James E. Colliflower, being first duly sworn, on oath deposes and says that he is the Treasurer of the James E. Colliflower & Company, Inc., a body corporate, named as plaintiff in the above-entitled cause; that said plaintiff corporation has a just right to recover from Beck & Guckert Floral Company, Inc., a body corporate named as defendant in the above-entitled cause, the sum claimed in the Declaration filed herein, to-wit, the sum of One Thousand Nine Hundred and Fifty Dollars (\$1,950.00), with interest on \$200.00 thereof from October 21, 1929, and on \$350.00 thereof from December 17, 1929, and on \$1,400.00 thereof from January 27, 1930, at the rate of 6% per annum until paid, besides costs; for that, on to-wit the 9th day of September, 1930, in a certain action then pending in the Corporation Court of the City of Alexandria, in the State of Virginia, a court of record having jurisdiction in the premises, wherein the plaintiff herein was plaintiff and the defendant herein was defendant, the plaintiff recovered a judgment against the defendant for the said sum and interest, and the said judgment remains in full force and effect, unsatisfied in whole or in part, unreversed, and not superseded; that the said defendant Beck & Guckert Floral Company, Inc., is a foreign corporation.

JAMES E. COLLIFLOWER,
Treasurer of James E. Colliflower & Co., Inc.

3 Subscribed and sworn to before me this 3rd day
of April, 1931.

[NOTARIAL SEAL.]

EDWARD F. RIGGS,
Notary Public, D. C.

My commission expires Feby. 9, 1934.

Memoranda.

April 3, 1931.—Attachment Bond (\$4,000) approved and filed.

Summons issued to Defendant.

Attachment-Writs (3) and Interrogatories (2) issued.

Marshal's Return on Writ of Attachment Issued April 3, 1931.

Attached credits, property of the defendant, in the hands of McCallum Sauber Company—by serving Herbert M. Sauber Vice President of said Company Personally Garnishee, and served said garnishee and defendant with copies of this Writ, Interrogatories, and the Notices Prescribed by Sections 446 and 456 of the Code.

4-4-1931.

EDGAR C. SNYDER,
U. S. Marshal.
W. J. ROBERTS,
Deputy.

4 *Marshal's Return on Summons Issued April 3, 1931.*

The Defendant, Beck and Guckart Floral Company, Inc., a corporation, not to be found 5/8/31.

EDGAR C. SNYDER,
U. S. Marshal in and for
the Dist. of Columbia,
By W. J. KIRKLAND,
Deputy U. S. Marshal.

Order of Publication.

Filed May 27, 1931.

* * * * *

The object of this suit is to recover of the defendant the sum of \$1,950.00 due from the defendant to the plaintiff under a judgment duly rendered in the Corporation Court of the City of Alexandria, Virginia, and to have judgment of condemnation of certain property of the defendant

levied on under an attachment issued in this suit to satisfy the plaintiff's claim.

It is, therefore, this 27th day of May, 1931, ordered that the defendant appear in this Court on or before the fortieth day, exclusive of Sundays and legal holidays, after the day of the first publication of this order, to defend this suit and show cause why said condemnation should not be had; otherwise, the suit will be proceeded with as in case of default.

Let a copy of this order be published once each week for three (3) successive weeks in the Washington Law Reporter and the Washington Herald.

JENNINGS BAILEY,
Justice.

5 *Affidavit as to Mailing of Copy of Order of Publication.*

Filed July 31, 1931.

* * * * *

DISTRICT OF COLUMBIA, ss:

I, Leo P. Harlow, being first duly sworn, upon my oath depose and say that I am the Attorney for the plaintiff in the above case; that the order of publication passed herein the 27th day of May, 1931, has been duly published in accordance with said order, as appears by the proofs of publication filed herewith by the Washington Law Reporter and the Washington Herald; that a copy of said order of publication was mailed, postage prepaid, to Beck & Guckert Floral Company, Inc., 123 South Royal Street, Alexandria, Va., on June 17, 1931, and that the receipt for the registry of said order of publication to the above defendant corporation is attached to this affidavit and prayed to be read as a part hereof.

LEO P. HARLOW.

Subscribed and sworn to before me this 29th day of July, 1931.

[NOTARIAL SEAL.]

RANDALL T. ELLIOTT,
Notary Public, D. C.

My commission expires March 31, 1935.

Receipt for Registered Article No. 343,762.

15 fee paid. 1st-class postage paid. (Date:) — —, 192—. From Leo P. Harlow, Suite 608 1331 G St. N. W. Addressed to Beck & Guckert Floral Co., Inc., 123 South Royal St., Alex., Va. Accepting employee will place initials in space below, indicating restricted delivery. Return receipt fee, 3. Special delivery fee, —. Delivery restricted to addressee in person, 1.55 P. M., or order, —.

POSTMASTER,
Per THOMPSON.

Washington, D. C., Jun. 17, 1931, Reg. Sec.

Memorandum.

July 31, 1931.—Proofs of Publication from Washington Herald and Washington Law Reporter, filed.

Supreme Court of the District of Columbia.

Friday, July 31, 1931.

Session resumed pursuant to adjournment, Hon. Joseph W. Cox, Presiding.

* * * * *

Comes now the plaintiff by its attorney of record and prays judgment herein against the defendant, who though duly notified by publication of the pendency of this proceeding hath not caused its appearance to be entered herein. Whereupon, it so appearing, judgment is
7 accordingly ordered to be entered against the interest of defendant in any credits or property of defendant attached by the U. S. Marshal in this cause.

Thereupon, it appearing by the return of the U. S. Marshal made to the writ of attachment issued herein April 3, 1931, against McCallum Sauber Company, garnishee, that said garnishee was duly served on the 4th day of April, 1931, but has failed to file its answer to the interrogatories herein, it is adjudged and ordered, that plaintiff recover of said garnishee the sum of One Thousand Nine Hundred Fifty Dollars (\$1,950.00), with interest on Two Hundred

Dollars (\$200.00), thereof from October 21, 1929, and on Three Hundred Fifty Dollars (\$350.00), thereof from December 17, 1929, and on One Thousand Four Hundred Dollars (\$1,400.00), thereof from January 27, 1930, together with costs of suit to be taxed by the Clerk and have execution thereof.

Memorandum.

January 4, 1932.—Attachment Writs (2) and Interrogatories (2) issued.

Marshal's Return on Writ of Attachment Issued January 4, 1932.

Attached credits in the hands of Security Savings & Commercial Bank by serving Chas. K. West, Asst. Cashier, Personally 1-4-32 and served with copies of this Writ, Interrogatories, and Notices as Garnishee of Defendant.

EDGAR C. SNYDER,

*U. S. Marshal in and for
the District of Columbia,*

By T. R. EAST,
Deputy.

B.

8

Notice.

Filed January 5, 1932.

* * * * *

To Security Savings & Commercial Bank, 1518 K St. N. W.,
Garnishee:

You are required to answer the following interrogatories, under oath, within ten days after service hereof. And should you neglect or refuse so to do, judgment may be entered against you for an amount sufficient to pay the plaintiff's claim, with interest and costs of suit.

LEO P. HARLOW,

MARSHALL H. LYNN,

Attorneys for Plaintiff.

Interrogatories.

1st. Were you at the time of the service of the writ of attachment, served herewith, or have you been, between the time of such service and the filing of your answer to this

interrogatory, indebted to the Garnishee McCallum-Sauber Co.? If so, how, and in what amount?

Answer. Yes; Balance of \$862.00. See answer to question 2.

2d. Had you, at the time of the service of the writ of attachment, served herewith, or have you had, between the time of such service and the filing of your answer to this interrogatory, any goods, chattels, or credits of said garnishee in your possession or charge? If so, what?

Answer. Yes; Balance to credit of McCallum-Sauber Company of \$862.00; same as above.

This Bank claims a lien on said balance until such time as checks that have been deposited to the credit of this account have had sufficient time for final payment.

I am the cashier of the Security Savings and Commercial Bank, and have personal knowledge of the facts upon which the above answers are based, and make this affidavit on behalf of said bank.

SAM'L R. BAULSIR.

Subscribed and sworn to before me this fourth day of January, 1932.

[NOTARIAL SEAL.]

VINCENT P. BOUDREN,
Notary Public, D. C.

9 *Motion to Vacate Alleged Judgment by Default Against Garnishee.*

Filed January 5, 1932.

* * * * *

Comes now McCallum Sauber Company, Garnishee, in the above cause and moves the court to vacate and set aside the default judgment entered herein against said garnishee upon the following grounds:

1) Said Writ of Garnishment was not in fact served upon the agent of said garnishee.

2) Said garnishee had no notice of said garnishment and the judgment thereon is void.

3) And for other grounds apparent on the face of said record and as will appear in the annexed affidavit hereby made a part hereof.

A. L. NEWMYER,
MILTON CONN,
Attorneys for Garnishee.

To Leo P. Harlow & Marshall H. Lynn, Esqs.,
Attorneys for plaintiff:

Take notice that the foregoing motion has been filed and will be called to the attention of the court on Thursday next, January 7, 1931.

A. L. NEWMYER,
MILTON CONN,
Attorneys for Garnishee.

Service acknowledged Jan. 5, 1932.

MARSHALL H. LYNN,
Atty. for Plf.

10 *Affidavit of Milton Conn.*

* * * * * *

DISTRICT OF COLUMBIA, *To wit:*

I, Milton Conn, being first duly sworn on oath depose and say that I am an attorney at law in the District of Columbia and on January 4, 1932, in company with Herbert M. Sauber, visited the office of the U. S. Marshal at the Court House and inquired of Deputy Marshal W. J. Roberts if he knew the gentleman with me (who was Herbert M. Sauber) Mr. Roberts replied that he did not know him and Mr. Sauber stated that he had never seen Mr. Roberts before. When Mr. Roberts' attention was called to the fact that the return on the Writ of Garnishment shows that he served the said Herbert M. Sauber, Mr. Roberts said that if the records showed that he served him, he must have done so, but that he did not recall it.

MILTON CONN.

Subscribed and sworn to before me this 5th day of January, 1932.

[NOTARIAL SEAL.]

AUGUSTA SILVERMAN,
Notary Public, D. C.

11 *Affidavit of Herbert M. Sauber.*

* * * * * *

DISTRICT OF COLUMBIA, *To wit:*

I, Herbert M. Sauber, being first duly sworn on oath depose and say that I am Vice President and General Manager

of McCallum Sauber Company, a corporation, of the District of Columbia, and have been since the incorporation of the said corporation in August 1930, engaged in business as wholesale florists. I deny that the Writ of Garnishment in the above entitled cause was served upon me on April 4, 1931 or at any other time, but on the contrary say that my first knowledge of said alleged garnishment was yesterday noon when I received notice from our bank that an attachment had been made thereon in this case to recover the judgment for \$1,950, with interest and costs. I further aver that the McCallum Sauber Company at the time its alleged said Writ of Garnishment was served was not indebted to the Beck and Guckert Floral Company in any sum whatsoever, but on the contrary the said Beck and Guckert Floral Company which had been engaged in the business of conducting greenhouses in Alexandria, Virginia, had ceased business 3 months after McCallum Sauber Company was organized and began business and there were no business transactions between the two corporations after December 1930.

I further aver that the attachment made in this cause on the bank account of the McCallum Sauber Company by reason of default judgment erroneously entered against it as aforesaid has and is resulting in great loss and hardship to said garnishee because approximately \$1,000 has been at-

12 attached thereby and outstanding checks which had been issued to creditors of the McCallum Sauber

Company are being returned unpaid by reason of said attachment and the credit of said corporation has been severely injured thereby. I further aver that at no time from July 31, 1931, when its alleged said default judgment was entered against said corporation until yesterday when said attachment on said judgment was served on the bank, was the fact that a judgment had been so taken ever called to the attention of this company and its officers nor did the company or its officers have knowledge thereof.

On yesterday I visited the court house and confronted the Deputy Marshal, who according to the return served the summons on me, and said Deputy stated that he did not know me and to my knowledge I never saw him before.

I further aver that I have been in business in the District of Columbia for a number of years and in the course of said business have been served with Writs of Garnishment

and have also answered the same promptly and am familiar with the fact that when such a Writ is served it must be answered, otherwise judgment will be entered.

HERBERT M. SAUBER.

Subscribed and sworn to before me this 5th day of January, 1932.

[NOTARIAL SEAL.]

AUGUSTA SILVERMAN,

Notary Public, D. C.

13

Memorandum.

January 6, 1932.—Memorandum of plaintiff in opposition to Garnishee's motion to vacate judgment against Garnishee filed.

Affidavit of W. J. Roberts on Garnishee's Motion to Vacate Judgment of Condemnation.

Filed January 6, 1932.

* * * * *

DISTRICT OF COLUMBIA, ss:

W. J. Roberts, being first duly sworn, on oath deposes and says: That he is and was, on the 4th day of April, 1931, a Deputy of the United States Marshal for the District of Columbia; that he has read the affidavits of Milton Conn and Herbert M. Sauber filed in this cause in support of the garnishee's motion to vacate the judgment of condemnation heretofore entered herein; that he recalls the call made on him by said Conn and Sauber on the 4th day of January, 1932, and referred to in their said affidavits. In reference to the statements in said affidavits in reference to said call, affiant now states that he did not at the time recognize the said Herbert M. Sauber, but that following said visit he referred to his memorandum record of his proceedings on and about the 4th day of April, 1931, and that having had his recollection refreshed by such reference, he now clearly recalls the service by him, on the 4th day of April, 1931, of the writ of attachment issued in this cause, and heretofore returned by affiant as served on said garnishee: that he delivered the said writ shortly before 9:00 o'clock on the morning of April 4th, 1931, at the place of business of said

garnishee, at 1314 Eye St., N. W., in this District;
 14 that deponent walked back in the place & said to
 some employee that he had a paper for the Mc-
 Callum-Sauber Co. & he was from the Marshal's office; that
 he was directed to a gentleman sitting at a desk & told to
 give him the paper as he was Herbert M. Sauber the Vice
 Pres. of the Co.; that he went to the gentleman & said that
 the paper was for him as Vice Pres. of the company; that
 the man took the paper, looked at it & said nothing & this
 affiant left & went back to his office & wrote his return on
 the garnishment.

W. J. ROBERTS.

Subscribed and sworn to before me this 6 day of Jan-
 uary, 1932.

FRANK E. CUNNINGHAM,

Clerk,

By WILLIAM W. STICKNEY,

Asst. Clerk.

*Interrogatories in Attachment to be Answered by
 Garnishee.*

Filed January 6, 1932.

* * * * *

To McCallum Sauber Company, 1314 I Street N. W., Gar-
 nishee:

You are required to answer the following interrogatories,
under oath, within ten days after service hereof. And
 should you neglect or refuse so to do, judgment may be
 entered against you for an amount sufficient to pay the
 plaintiff's claim, with interest and costs of suit.

LEO P. HARLOW,

MARSHALL H. LYNN,

Attorneys for Plaintiff.

1st. Were you at the time of the service of the writ of
 attachment, served herewith, or have you been, between the

time of such service and the filing of your answer to this interrogatory, indebted to the defendant? If so, how, and in what amount?

Answer. No.

2d. Have you, at the time of the service of the writ of attachment, served herewith, or have you had, between the time of such service and the filing of your answer to this interrogatory, any goods, chattels, or credits of the defendant in your possession or charge? If so, what?

Answer. No.

McCALLUM SAUBER CO.,
By HERBERT M. SAUBER,
Vice-Pres.

Subscribed and sworn to before me this 6th day of January, A. D. 1932.

[NOTARIAL SEAL.]

SAUL G. LICHTENBERG.

Supreme Court of the District of Columbia.

Friday, January 8, 1932.

Session resumed pursuant to adjournment, Hon. Peyton Gordon, Justice, presiding.

* * * * *

Upon consideration of the motion filed herein to vacate judgment by default against the garnishee McCallum-Sauber Company entered herein on the 31st day of July, 1931, it is ordered that said motion be and the same is hereby granted, and the said judgment of condemnation entered herein on said date against the McCallum-Sauber Company, Garnishee, is hereby vacated set aside and for naught held, with leave to the said garnishee to file
16 its answer herein nunc pro tunc, April 4, 1931, the alleged date of service of the interrogatories and writ of attachment on the said garnishee. Whereupon, the plaintiff moves to strike the said answer of garnishee as filed nunc pro tunc, and upon consideration of said motion it is ordered that said motion be and the same is hereby denied. Whereupon, comes now the plaintiff by its attorney of record and prays judgment of condemnation against the credits of the garnishee McCallum-Sauber Company attached by the United States Marshal in the hands of Security Savings and Commercial Bank, Garnishee, upon the 4th day of January, 1932, whereupon, after consideration

of said motion it is ordered that the said motion for condemnation be and the same is hereby overruled and writ of attachment against the Security Savings and Commercial Bank, Garnishee, is hereby dismissed and the said garnishee discharged.

From the foregoing order the plaintiff by its attorney of record, in open court, notes an appeal to the Court of Appeals of this District; whereupon, an undertaking to act as a cost bond is hereby fixed in the sum of One Hundred Dollars (\$100.00) with leave to deposit Fifty Dollars (\$50.00) cash with the clerk in lieu thereof.

Memorandum.

January 22, 1932.—\$50 deposited in lieu of bond on appeal.

17

Assignment of Errors.

Filed January 28, 1932.

* * * * *

The Court erred:

(1) In considering the motion of the garnishee McCallum-Sauber Company to vacate the judgment of condemnation entered against it on July 31, 1931, because said motion was not in accordance with Law Rule 32 of the Court.

(2) In vacating the judgment of condemnation against the garnishee McCallum-Sauber Company entered July 31, 1931.

(3) In granting leave to the garnishee McCallum-Sauber Company to file its answer *nunc pro tunc* to the interrogatories shown by the record to have been served upon it April 4, 1931.

(4) In denying plaintiff's motion to strike the answer of the garnishee McCallum-Sauber Company.

(5) In overruling plaintiff's motion for judgment of condemnation against the credits of the garnishee McCallum-Sauber Company attached by the U. S. Marshal in the hands of the Security Savings & Commercial Bank, garnishee, upon the 4th day of January, 1932, and in dismissing the writ of attachment against said garnishee Bank, and discharging said garnishee Bank.

(6) In other respects apparent of record.

LEO P. HARLOW,
MARSHALL H. LYNN,
Attorneys for Plaintiff.

18

Docket Entries.

Date.	Proceedings.
1931.	
April 3.	Appearance; Petition; Affidavit Filed.
“ “	Attachment Bond (\$4,000.00) with the Globe Indemnity Co., surety, approved & filed.
“ “	Summons (2) & copy decl. issued.
“ “	Attachment writs (3) & Ints. (2) issued.
“ 10.	Attachment retd. Attached credits in hands of McCallum Sauber Co. garnishee 4/4/31.
May 11.	Summons retd. not found all 5/8/31.
“ 27.	Order Publication (2 copies). (M. 84, P. 114.)
July 31.	Affidavit of mailing of order of Publication filed.
“ “	Proof of Publication Washington Herald (\$12.60 Paid) filed.
“ “	Proof of Publication Washington Law Reporter (\$12.00 Paid) filed.
“ “	Judgment of condemnation against garnishee for failure to answer, for \$1,950.00, interest & costs, Cox J. (M. 84, P. 218).
1932.	
Jan. 4.	Attachment writs (2) & Ints. (2) issued.
“ 4.	Attachment retd. Attached credits in hands of Security Savings & Commercial Bank, garnishee, filed.
“ 5.	Newmyer for Deft.—Mo. to vacate Judgt. Notice & Affts. (2) filed.
“ 5.	Ans. of Sec. Sav. & Com. Bk. garnishee filed.
“ 6.	Plffs. points & authorities & afft. of garnishee filed.
“ 6.	Answer of McCallum-Sauber Co. garnishee filed.
“ 8.	Motion to vacate Judgment vs. McCallum-Sauber Co. garnishee, entered on July 31", 1931, granted. Judgment vs. said garnishee vacated & set aside, with leave to garnishee to file its answer to interrogatories nunc pro tunc. Plaintiff's motion to strike said answer of garnishee nunc pro tunc overruled. Motion for Judgment of Condemnation vs. Security Savings & Commercial Bank, garnishee, denied. Writ dismissed & garnishee discharged. Appeal noted.

1932. Bond fixed at \$100.00 or \$50.00 cash, Gordon J. (M. 84, P. 488).
- Jan. 22. \$50 deposited by Plff. in lieu of bond on appeal.
- “ “ Designation of record filed.
- “ 28. Deposit for Clerk.
- “ “ Assignments of Error filed.

19 *Designation of Record for Appeal.*

Filed January 22, 1932.

* * * * *

Now comes James E. Colliflower & Co., Inc., the appellant in the above-entitled cause, and designates the parts of the record which he desires to have included in the transcript, said parts being considered sufficient for the determination of the questions raised on appeal, namely:

1. Plaintiff's Declaration and affidavit for attachment.
2. Memo. of filing of bond.
3. Memo. of issuance of summons.
4. Memo. of issuance of attachments and interrogatories.
5. Return of Marshal on attachment.
6. Return of Marshal on summons.
7. Order of publication.
8. Affidavit of mailing of order of publication.
9. Memo. of filing of proofs of publication.
10. Judgment entered July 31, 1931.
11. Memo. of issuance of attachment and interrogatories Jan. 4, 1932.
12. Return of Marshal on attachment above.
13. Answer of Garnishee Security Savings & Commercial Bank.
14. Defendant's motion to vacate judgment, notice and affidavits.
15. Memo. of filing of plaintiff's memo. of points and authorities.
16. Affidavit of W. J. Roberts.
17. Answer of Garnishee McCallum-Sauber Company.
18. Judgment entered January 8, 1932.
- 20 19. Memo. of deposit in lieu of appeal bond.
20. Assignment of Errors.
21. All Docket Entries.

Together with a copy of this designation.

LEO P. HARLOW,
MARSHALL H. LYNN,
Attorneys for Plaintiff, Appellant.

Service of copy acknowledged January 22, 1932.

ALVIN L. NEWMYER,

By D. T. BURR,

Attorney for Garnishee McCallum-Sauber Company.

PEYSER, EDELIN & PEYSER,

By GEORGE E. EDELIN,

Attorneys for Garnishee Security

Savings & Commercial Bank.

21 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,

District of Columbia, ss:

I, Frank E. Cunningham, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 20, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 79439 at Law, wherein James E. Colliflower & Co. Inc., a corporation, is Plaintiff and Beck & Guckert Floral Co. Inc., a corporation, is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 23rd day of March, 1932.

[Seal Supreme Court of the District of Columbia.]

FRANK E. CUNNINGHAM,

Clerk,

By CHAS. B. COFLIN,

Assistant Clerk.

Endorsed on cover: District of Columbia Supreme Court. No. 5641. James E. Colliflower & Co., Inc., a corporation, appellant, vs. McCallum-Sauber Company, garnishee, and Security Savings & Commercial Bank, garnishee. Court of Appeals, District of Columbia. Filed Mar. 25, 1932. Henry W. Hodges, Clerk.

IN THE
Court of Appeals, District of Columbia.

APRIL TERM, 1932.

No. 5641

JAMES E. COLLIFLOWER & CO., INC.,
A CORPORATION, APPELLANT,

v.

McCALLUM-SAUBER COMPANY, GARNISHEE, AND
SECURITY SAVINGS & COMMERCIAL BANK,
GARNISHEE.

BRIEF FOR APPELLANT.

LEO P. HARLOW,
MARSHALL H. LYNN,
Attorneys for Appellant.

IN THE
Court of Appeals, District of Columbia
APRIL TERM, 1932.

No. 5641

JAMES E. COLLIFLOWER & CO., INC.,
A CORPORATION, APPELLANT,

v.

McCALLUM-SAUBER COMPANY, GARNISHEE, AND
SECURITY SAVINGS & COMMERCIAL BANK,
GARNISHEE.

BRIEF FOR APPELLANT.

Statement of the Case.

This is an appeal from a judgment of the Supreme Court of the District of Columbia setting aside a default judgment of condemnation, entered six months previously, and dismissing an attachment issued upon

that judgment. The proceedings in the lower court, in which the appellant here was plaintiff, and the appellees were garnishees, were as follows:

On the 3rd day of April, 1931, appellant filed its declaration in debt against the Beck & Guckert Floral Company, Inc., a non-resident corporation, claiming the sum of \$1,950.00, with interest (Record, p. 2). With the declaration was filed an affidavit for attachment in accordance with Section 445 of the District of Columbia Code (Record, p. 3), pursuant to which there was issued a writ of attachment, with interrogatories directed to the McCallum-Sauber Company as garnishee (Record, p. 4). This writ was returned in due course, with the following return endorsed thereon:

“Attached credits, property of the defendant, in the hands of *McCallum-Sauber Company* by serving *Herbert M. Sauber, Vice-President of said company, personally*, Garnishee, and served said garnishee and defendant with copies of this writ, interrogatories and the notices prescribed by Sections 446 and 456 of the Code.

EDGAR C. SNYDER,

Marshal,

W. J. ROBERTS,

Deputy.

4-4-31.”

(Record, p. 4.)

Process against the defendant Beck & Guckert Floral Company, Inc., having been returned “Not Found” (Record, p. 4), order of publication was entered against it and duly published and mailed, in

accordance with Section 108, District of Columbia Code (Record, pp. 4, 5). Publication having matured, on July 31, 1931 the following judgment was entered (Record, pp. 6, 7):

“Comes now the plaintiff, by its attorney of record, and prays judgment herein against the defendant, who, though duly notified by publication of the pendency of this proceeding, hath not caused its appearance to be entered herein. Whereupon, it so appearing, judgment is accordingly ordered to be entered against the interest of defendant in any credits or property of defendant attached by the U. S. Marshal in this cause.

“Thereupon, it appearing by the return of the U. S. Marshal made to the writ of attachment issued herein April 3, 1931, against McCallum-Sauber Company, garnishee, that said garnishee was duly served on the 4th day of April, 1931, but has failed to file its answer to the interrogatories herein, it is ADJUDGED and ORDERED that plaintiff recover of said garnishee the sum of \$1,950.00, with interest on \$200.00 thereof from October 21, 1929, and on \$350.00 thereof from December 17, 1929, and on \$1,400.00 thereof from January 27, 1930, together with costs of suit to be taxed by the Clerk, and have execution thereof.

COX, *Justice.*”

On January 4, 1932, a writ of attachment on the judgment of condemnation against the McCallum-Sauber Company was issued, and served, with interrogatories, on the Security Savings and Commercial Bank (Record, p. 7). The following day, the McCallum-Sauber Company appeared and filed its motion to

set aside the judgment of July 31, 1931, stating as ground therefor that the writ of attachment had never been served on it and it had had no notice of the garnishment. In support of this motion there was filed an affidavit of the Vice-President of the Company upon whom the writ was shown by the Marshal's return to have been served, denying the fact of such service; and an affidavit of an attorney that the Deputy Marshal who made the return, upon being confronted with the Vice-President nine months after the date of service, had failed to recognize him (Record, pp. 8, 10). In opposition to the motion, the plaintiff filed an affidavit of the Deputy Marshal, setting forth in detail the circumstances of the service shown by his return (Record, p. 11). On January 5, 1932, the Security Savings and Commercial Bank filed its answer to the interrogatories served upon it, disclosing credits to the account of the McCallum-Sauber Company in the amount of \$862.00 (Record, pp. 7, 8). On January 6, 1932, the McCallum-Sauber Company filed answers to the interrogatories issued with the original attachment of April 3, 1931, denying the possession of any property or assets of or indebtedness to the defendant Beck & Guckert Floral Company, Inc. (Record, pp. 12, 13).

After hearing, in which no additional facts or evidence as to the alleged falsity of the Marshal's return upon the original writ of attachment of April 3, 1931, were adduced, the court below entered the following judgment, from which this appeal is prosecuted (Record, pp. 13, 14) :

“Upon consideration of the motion filed herein to vacate judgment by default against

the garnishee, McCallum-Sauber Company, entered herein on the 31st day of July, 1931, it is ORDERED that said motion be, and the same is hereby granted, and the said judgment of condemnation entered herein on said date against the McCallum-Sauber Company, Garnishee, is hereby vacated, set aside and for naught held, with leave to the said garnishee to file its answer herein *nunc pro tunc*, April 4, 1931, the alleged date of service of the interrogatories and writ of attachment on the said garnishee. Whereupon, the plaintiff moves to strike the said answer of garnishee as filed *nunc pro tunc* and upon consideration of said motion, it is ORDERED that said motion be and the same is hereby denied. Whereupon, comes now the plaintiff, by its attorney of record, and prays judgment of condemnation against the credits of the garnishee McCallum-Sauber Company, attached by the U. S. Marshal in the hands of the Security Savings and Commercial Bank, garnishee, upon the 4th day of January, 1932; whereupon, after consideration of said motion it is ORDERED that the said motion for condemnation be and the same is hereby overruled and writ of attachment against the Security Savings and Commercial Bank, garnishee, is hereby dismissed and the said garnishee discharged.

“From the foregoing order the plaintiff, by its attorney of record in open court, notes an appeal to the Court of Appeals of this District; whereupon an undertaking to act as a cost bond is hereby fixed in the sum of \$100.00, with leave to deposit \$50.00 cash with the Clerk in lieu thereof.

GORDON, *Justice.*”

Errors Relied Upon.

Appellant submits that the court below erred in the following respects, all of which are apparent upon the face of the record:

(1) In considering the motion of the garnishee McCallum-Sauber Company to vacate the judgment of condemnation entered against it on July 31, 1931, because said motion was not in accordance with Law Rule 32 of the court.

(2) In vacating the judgment of condemnation against the garnishee McCallum-Sauber Company entered July 31, 1931.

(3) In granting leave to the garnishee McCallum-Sauber Company to file its answer *nunc pro tunc* to the interrogatories shown by the record to have been served upon it April 4, 1931.

(4) In denying plaintiff's motion to strike the answer of the garnishee McCallum-Sauber Company.

(5) In overruling plaintiff's motion for judgment of condemnation against the credits of the garnishee McCallum-Sauber Company attached by the U. S. Marshal in the hands of the Security Savings & Commercial Bank, garnishee, upon the 4th day of January, 1932, and in dismissing the writ of attachment against said garnishee Bank, and discharging said garnishee Bank.

Points of Law Presented by Assignment of Errors.

In support of its contention that the court erred in the matters above set forth, appellant submits the following propositions:

(1) Law Rule 32, Rules of the Supreme Court of the District of Columbia (as amended April 10, 1931), Paragraph 4, provides: "With each motion there must be filed on a separate paper a statement of the specific points or propositions of law, together with the authorities relied on in support thereof." (Assignment of Error No. 1.)

(2) An official return of process cannot be impeached by the unsupported testimony of the party upon whom service is stated by the officer to have been made, even though the officer may not recall the service. (Assignment of Error No. 2.)

(3) A judgment of condemnation against a garnishee for failure to answer, regularly entered and valid on its face, cannot be vacated after the expiration of the term at which it was entered for the purpose of allowing an answer to be filed. (Assignments of Error Nos. 3 and 4.)

(4) A final judgment having been erroneously set aside, refusal of a judgment of condemnation on an answer of a garnishee disclosing credits of the judgment debtor is likewise erroneous. (Assignment of Error No. 5.)

ARGUMENT.*Proposition 1:*

At the outset, appellant contends that the motion of the original garnishee, McCallum-Sauber Company, to vacate and set aside the judgment of condemnation entered against it on July 31, 1931, should not have been entertained in the court below because said motion was not made in compliance with its rules. Law Rule 32, Supreme Court of the District of Columbia, which controls the motion in question, requires, in the fourth paragraph, that with each motion there *must* be filed on a separate paper a statement of the specific points or propositions of law relied on in support thereof. This rule, as the record shows, was not complied with by the McCallum-Sauber Company, there having been filed by it nothing but its motion, and two supporting affidavits.

This point was raised by appellant on the argument on the motion in the court below, and ignored. Appellant submits, however, that the language of the rule is mandatory, and contains no exceptions, and that therefore the failure of the court to apply and enforce its plain requirements is a complete nullification of the rule.

Proposition 2:

Considering this appeal on the merits of the order of January 8, 1932, which is the order appealed from, it is manifest that the primary question presented is the propriety of the action of the court in vacating the

judgment of July 31, 1931, since all the other provisions of the order depend upon this.

Upon examination of the motion to vacate the judgment, and the affidavits filed in support thereof (Record, pp. 8, 9, 10), it will be seen that the sole ground presented by the motion was that the judgment was void because rendered without service of notice upon the garnishee McCallum-Sauber Company. According to the solemn record of the court, service had been regularly and properly made by one of the deputy marshals of the District of Columbia, who had made his official return of that fact to the court (Record, p. 4).

In order, therefore, to establish the invalidity of the judgment attacked, it was necessary to overcome the official return of a public officer, forming a constituent part of a judicial record.

In 21 R. C. L., p. 1321 (Article "Process", Section 70), the following statement of the law as to impeachment of official returns of process appears:

“* * * In England, it has been the established law from a very early day that the return is conclusive as between the parties, and that the remedy of a party injured by a false return is by an action against the sheriff on his official bond, in which case alone the truth or falsity of the return may be inquired into. In this country the weight of authority seems to support the position that, as to facts which it is the duty of the officer to state, his return is conclusive as between the parties and privies to the suit and others whose rights are necessarily dependent

on it, unless its falsity is disclosed by some other portion of the record of the case. The privies who are concluded are those whose privity would enable them to sue the officer for a false return. If the return is false the defendant's remedy is in an action against the officer for a false return.

* * * ,,

Counsel for appellant can find no decided cases binding upon this Court establishing the effect to be given to such a return, but earnestly submit that reason as well as authority supports the rule above stated. For entirely aside from all considerations of the desirability of maintaining the inviolability of judicial records, in the final analysis, if the return is false, it is the fault of the officer, and not of the plaintiff; the officer, therefore, rather than the plaintiff, should bear the burden of litigation or other inquiry as to the falsity of his return.

Assuming, however, that the return of the marshal here involved is subject to impeachment by motion to vacate the judgment entered thereon, appellant most positively contends that the showing made in this case was wholly and completely inadequate to overcome the return.

The only showing offered or made by the McCallum-Sauber Company on its motion consisted of the two affidavits filed with its motion. Of these, one, by Milton Conn (Record, p. 8), its attorney, merely stated that the Deputy Marshal whose name was signed to the disputed return, did not on January 4, 1932, recognize Herbert M. Sauber, upon whom, according to his return, he had served the attachment, notices, and in-

terrogatories on April 4, 1931. That this affidavit is without substantial weight is too obvious to require argument. It is manifestly absurd to expect the Deputy Marshal of the District of Columbia to be able to remember over such a space of time every person upon whom he might have served process in the course of his official duties, and the failure of such a Deputy to be blessed with such a memory can certainly not in any wise affect or be used to cast any doubt upon the accuracy of his official return made at the time of such service. The very purpose of the return is to make the acts of the Marshal matters of official record and so eliminate any necessity for relying upon human memory as to such transactions.

The second affidavit, by Herbert M. Sauber, Vice-President and General Manager of the McCallum-Sauber Company, and the person upon whom service is shown by the return to have been made, states only the following material facts: That he was Vice-President and General Manager of said corporation; that the writ of garnishment in this cause was not served upon him on April 4, 1931, or at any other time, and that his first knowledge thereof was on the 4th day of January, 1932; that the garnishee Company was not at the time of the alleged service indebted to the principal defendant, Beck & Guckert Floral Company; that none of the officers of the Company had any knowledge or notice of the judgment of July 31, 1931, until the 4th of January, 1932.

Even in those jurisdictions in which a return of process is not regarded as conclusive, it is nevertheless accorded such strong evidentiary weight as to be

overcome only by clear, unequivocal and convincing evidence. (U. S. v. Gayle, 45 Fed. 107; Adkins v. Selbyville Mfg. Co., 134 Md. 497; Cooper v. Jewett, 233 Fed. 618; Piedmont-Mt. Airy Guano Co. v. Merritt, 154 Md. 226; Marnik v. Cusack, 317 Ill. 362, 148 N. E. 42). It is, therefore, held that an official return of process cannot be impeached by the unsupported testimony of the party upon whom service is stated by the officer to have been made, and the failure of the officer to recall the service adds nothing to the weight of such testimony. (Piedmont-Mt. Airy Guano Co. v. Merritt, *supra*; Marnik v. Cusack, *supra*.)

In accordance with the law as established by the cases last cited, the motion to vacate the judgment should have been denied on the very nature of the affidavits filed, without reference to their contents. But under no possible view can it be held that the affidavits, given the benefit of every reasonable intendment, are sufficient to constitute such clear, unequivocal and convincing evidence as is necessary to overcome the return of the Marshal, with the presumption of validity, however slight, which must be attached to it.

Looking only at the return, on the one hand, that service was made on Sauber, and on the other hand, at the affidavit of Sauber that it was not made, the presumption of validity weighs down the balance in favor of the return. But on a closer view, it will be seen that the case against the return is not even so strong as that. For the service in question was against a corporation, having an office and regularly conducting business in the District of Columbia; and

in his affidavit, Mr. Sauber, while stating unequivocally that the alleged service was not made on him, and that no knowledge or notice of the judgment of July 31, 1931, was had by him or any other officer of the corporation until six months later, carefully refrains from stating that no officer or agent of the corporation had notice of the writ of garnishment, notice and interrogatories directed to the corporation. The garnishee company does not, therefore, show, as its counsel contended, that judgment was entered against it without its having any notice or knowledge of the pendency of the proceedings.

The importance of this gap in the Sauber affidavit becomes manifest upon reading the affidavit of the Deputy, W. J. Roberts, filed by the plaintiff in connection with the motion to vacate (Record, p. 11). In this affidavit the Deputy states positively and unequivocally that he served the writ by delivering a copy, at the garnishee corporation's place of business, to a person there pointed out to him by an agent or servant of the corporation as its Vice-President, who received the papers from the Deputy and acknowledged his identity by his silence when told that he was being served as Vice-President of the company.

Considering these affidavits together, the true fact must be either (1) that the Deputy's affidavit is false; or (2) that Sauber's affidavit is false; or (3) that the Deputy was deliberately deceived and misled by the company's employees into making a return showing service on one agent of the company when he had actually served another.

The first theory cannot be accepted by the Court; under either of the others the corporation is not entitled to any relief against the judgment.

For the several reasons above set forth, both collectively and individually, appellant accordingly submits that the motion to vacate the judgment of July 31, 1931, should have been denied, and that the order vacating the same must be reversed.

Proposition 3:

The law in this jurisdiction is well settled that a final judgment cannot be set aside by the court which rendered it after the close of the term at which it was entered. (R. L. Polk & Co. *v.* Smolik, 44 App. D. C. 55; Board of Children's Guardians *v.* Juvenile Court, 43 App. D. C. 599.)

If, therefore, the judgment of July 31, 1931, was not wholly void for want of jurisdiction over the McCallum-Sauber Co., the court below was without jurisdiction to reopen it to allow the filing of answers to the interrogatories which the Company claimed had never been served upon it.

The provisions of the order of January 8, 1932, refusing to strike out the answer of the McCallum-Sauber Company to the interrogatories addressed to it (which answer was filed six months after the entry of judgment and before hearing on the motion to vacate the judgment), and allowing the answer to be filed *nunc pro tunc* as of the time when the record showed the interrogatories to have been served, render said order of January 8 wholly incomprehensible

as to the grounds on which it was entered. For if the Court was of opinion that the Company had established the fact that no service had been made on it, then the Court should have vacated the judgment, as wholly void *ab initio*; and under those circumstances to require or even permit an answer to be filed to interrogatories which had never been served would be quite unjustifiable.

If, on the other hand, the Court did not find that the lack of service had been satisfactorily established, there was nothing whatsoever before it, either in the motion or in the affidavits filed, to justify the garnishee being permitted to file an answer, even assuming that the Court had jurisdiction to allow it.

Proposition 4:

Considering finally the provisions of the order appealed from denying judgment of condemnation of the credits of the McCallum-Sauber Company disclosed by the answer of the garnishee Security Savings and Commercial Bank, dismissing the attachment levied thereon, and discharging the bank, it is manifest that the propriety of this action depends squarely upon the validity of the judgment of July 31, 1931, and hence upon the validity of the return of the Deputy Marshal attacked by the McCallum-Sauber Company. At the time of the issuance of the writ and interrogatories served upon the bank, the judgment against the McCallum-Sauber Company was regular on its face, unreversed, not appealed from, the term of court at which it was entered had long since expired, and no attack had been made on its validity. Unless, there-

fore, it was void *ab initio*, the attachment issued on it was valid, and judgment of condemnation should have been entered against the credits attached by virtue of that attachment. (D. C. Code, Title 24, Section 295—Code of 1902, Section 1098.)

Conclusion.

Appellant in conclusion respectfully submits that the order appealed from was erroneous in every respect, and should be reversed *in toto*, and judgment of condemnation entered forthwith against the credit of \$862.00 of the McCallum-Sauber Company attached in the hands of the Security Savings and Commercial Bank.

LEO P. HARLOW,
MARSHALL H. LYNN,
Attorneys for Appellant.

SEP 2 1932

Henry W. Hodges

CLERK

IN THE
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APRIL TERM, 1932.

No. 5641.

JAMES E. COLLIFLOWER & Co., Inc., a Corporation,
Appellant,

vs.

McCALLUM-SAUBER COMPANY, Garnishee, and
SECURITY SAVINGS & COMMERCIAL BANK, Garnishee.

BRIEF FOR APPELLEE.

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MILTON CONN,
Attorneys for Appellee,
McCallum-Sauber Company.

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McCALLUM-SAUBER COMPANY, Garnishee, and
SECURITY SAVINGS & COMMERCIAL BANK, Garnishee.

BRIEF FOR APPELLEE.

STATEMENT OF CASE.

This is an appeal by the plaintiff below from an order of the Supreme Court of the District of Columbia entered on January 8, 1932, (1) setting aside a default judgment of condemnation for \$1950 with interest and costs entered on July 31, 1931, against the appellee, McCallum-Sauber Co., garnishee, with leave to answer interrogatories, in an action in debt on a

judgment pending in the said court, wherein the appellant was plaintiff and Beck & Guckert Floral Co., Inc., a corporation, was defendant; (2) overruling appellant's motion to strike answers to interrogatories filed by said appellee and in denying appellant's motion for judgment of condemnation against the appellee, Security Savings and Commercial Bank, garnishee upon the default judgment against the appellee McCallum-Sauber Company, which had been vacated by the court; and, (3) dismissing the writ and discharging the said garnishee bank. The record of the proceedings in the court below is complete and discloses the following material facts:

Appellant obtained a judgment against Beck & Guckert Floral Co., Inc., a corporation, on the 9th day of September, 1930, in the Corporation Court of the City of Alexandria, State of Virginia, for \$1950 with interest and costs. Thereafter, on April 3, 1931, appellant filed its declaration in debt in the District of Columbia for \$1950 against the Beck & Guckert Floral Co., Inc., defendant, against whom the judgment in Virginia had been obtained, and also filed an affidavit for attachment and issued a writ of attachment and interrogatories directed to the appellee, McCallum-Sauber Co., as garnishee. (R. 2, 3) On the following day the writ of attachment was returned endorsed with the signature of W. J. Roberts, a deputy marshal, stating that the writ had been served upon "Herbert M. Sauber, Vice-President of said company personally, garnishee." (R. 3, 4) Service upon the defendant Beck & Guckert Floral Co., Inc., having been returned "not to be found 5/8/31", publication was ordered against the said defendant on May 27, 1931. (R. 4, 5, 6)

On July 31, 1931, according to the entries on the docket (R. 15), the affidavit of mailing order of publication was filed together with proof of publication in the Washington Herald and the Washington Law Reporter and also "judgment of condemnation against the garnishee for failure to answer, for \$1950.00, interest and costs."

It is important to note that the records in the proceedings together with the official docket entries fail to disclose that any judgment in the District of Columbia was ever entered against the principal defendant, Beck & Guckert Floral Co., Inc., and notwithstanding this prerequisite to entry of judgment against the garnishee, the trial court on the aforesaid date did enter judgment of condemnation against the McCallum-Sauber Co., garnishee, for failure to answer the interrogatories.

The minute entry by the court of July 31, 1931, granting judgment against the garnishee, contained merely a prayer for judgment against the principal defendant without referring to the amount of such judgment, but no judgment against the principal defendant was entered by the court and no judgment therefore existed against the principal defendant to be entered upon the docket, nor does the court docket show that a judgment against the principal defendant was ever entered (R. 15).

No further action in the cause was taken by the appellant for over five months, when, on January 4, 1932, a writ of attachment on the default judgment of condemnation against the garnishee, McCallum-Sauber Co., was issued and interrogatories served on the Security Savings and Commercial Bank (R. 7, 15), where the McCallum-Sauber Co. had a deposit bal-

ance of \$862.00. On this date the McCallum-Sauber Company first learned of the action taken against it by the appellant and that a default judgment of condemnation had been entered against it. Immediately a motion to vacate the default judgment of July 31, 1931, was filed on the ground that the company had not in fact been served, that the company had not received notice of the proceedings and for other grounds "apparent on the face of the record." (R. 8) Together with the motion there was filed an affidavit of Herbert M. Sauber, Vice-President of the company, stating that he had never been served with any writ of garnishment in the case nor did he ever have notice of any of the proceedings until January 4, 1932, when the company's deposit account with the bank was attached, nor did the company or any other officer have notice thereof. The affiant further averred that at the time the alleged writ of garnishment was served the company was not indebted to the principal defendant, that the principal defendant had ceased doing business three months after the McCallum-Sauber Company was organized and that he never saw or knew the deputy marshal, who is alleged to have served the writ of garnishment upon him, and that on the preceding day he went to the marshal's office where he met the deputy marshal and that the said deputy did not know him, nor did he recognize the deputy as ever having seen him before. The affiant further stated that he had been engaged in business in the District of Columbia for a number of years and had had writs of garnishment served upon him in the course of his business and that he was familiar with the duties of a person upon whom such writs are served. (R. 9, 10)

With the motion there was also filed an affidavit of Milton Conn, attorney of record, that on January 4, 1932, the day when notice of proceedings was first obtained by the company, he personally went to the marshal's office with Herbert M. Sauber, upon the occasion referred to in the Sauber affidavit, and that on that occasion when Sauber was confronted with the deputy marshal the latter said that he did not know Mr. Sauber and Mr. Sauber said he had never before seen Mr. Roberts, the deputy marshal. (R. 9) An aftermath of this occurrence was presented in the affidavit of the deputy marshal filed by the appellant with the memorandum in opposition to the motion to vacate, wherein he averred that though he did not recognize Mr. Sauber on the occasion of his visit with Mr. Conn, he subsequently did refresh his recollection by examining his records and thereafter could only recall that about 9 o'clock on the morning of April 4, 1931, he went to the garnishee's place of business and served a copy of the writ of attachment upon someone pointed out to him to be the vice-president of the company. Mr. Roberts, the deputy marshal, did not and could not state in his affidavit that the person to whom he delivered a copy of the writ was Mr. Sauber. (R. 11)

On January 6, 1932, the company filed answers to the interrogatories issued by the appellant with the original affidavit in the principal action, filed on April 3, 1931, wherein the company denied the possession of any property belonging or credits owing to the Beck & Guckert Floral Co., Inc. (R. 12, 13)

The motion to vacate was argued on January 8, 1932, and an order was entered on the said date vacating the judgment of condemnation against the McCallum-

Sauber Company entered on July 31, 1931, and granting leave to the company to file answers to the interrogatories, *nunc pro tunc*. The court further overruled appellant's motion to strike the answer to interrogatories and also overruled its motion for judgment of condemnation against the bank, and ordered the writ dismissed and the bank discharged. From the foregoing order the appellant noted its appeal to this court. (R. 13, 15)

The single question presented upon this appeal, by the errors assigned, is whether or not the court below committed error in vacating the default judgment of condemnation against the appellee, McCallum-Sauber Co., for upon the correctness of this order hinges the correctness of the other orders of the court, which are corollaries or appendages of the principal order to vacate.

In support of the trial court's ruling vacating the default judgment of condemnation, the appellee, McCallum-Sauber Company, relies upon the following propositions:

(1) The court committed no error in vacating the default judgment of condemnation on jurisdictional grounds.

(2) An order of court vacating a default judgment, supported by adequate defense to the merits of the action, is not an appealable order.

(3) The court properly considered the affidavits filed relative to the service of process and notice to the appellee, McCallum-Sauber Co., Garnishee.

(4) The failure of the appellee, McCallum-Sauber Company, to file a memorandum of authorities in support of the motion to vacate does not constitute reversible error.

ARGUMENT.

I.

The Court Committed no Error in Vacating the Default Judgment of Condemnation on Jurisdictional Grounds.

The validity of the judgment against the garnishee, McCallum-Sauber Co., entered on July 31, 1931, upon jurisdictional grounds, depends upon whether or not there existed a basic judgment against the principal defendant. No judgment against the principal defendant, Beck & Guckert Floral Co., Inc., is to be found by examining the docket entries, nor was any judgment ever entered on or prior to July 31, 1931. (R. 15) In Title 24, Section 139, of the Code of Laws of the District of Columbia, it is provided that, "If the defendant in the action has been served with process, final judgment shall not be rendered against the garnishee until the action against the defendant is determined."

Default by the garnishee does not preclude attack upon the regularity of the proceedings and the jurisdiction of the court entering judgment.

Warner Coal Co. v. Nelson, 204 Mich. 317, 169
N. W. 852.

A judgment against the principal defendant is essential to the entry of a valid judgment against the garnishee.

Laselle v. Leland, 298 F. 275.
Atchison T. & S. F. Ry. v. Wells, 285 F. 369.
Klepstein v. Allen-Miles Co., 136 F. 385.
Shinn v. Zimmerman, 23 N. J. L. 150.
Warner Coal Co. v. Nelson, 204 Mich. 317, 169
N. W. 852.

Swasey v. Antram, 24 Oh. St. 87.

Bank of Endova v. Ross, 168 Ark. 754, 271 S. W. 703.

Flaketown Graphite Co. v. Dale, 17 Ala. App. 32, 81 So. 246.

In Laselle v. Leland, *supra*, the court said:

“It was contended in argument and brief for plaintiffs that the court should have given judgment for them in the attachment and garnishment writs, but this contention is not well taken. The law permits judgment against the garnishee and condemning the property attached, only upon the plaintiff recovering against the main defendant.”

The court, in Nashville C. & St. L. Ry. v. Brown, 60 S. E. 319, said:

“The garnishee has a right to demand as a condition precedent to a final judgment against him, the exhibition of a judgment against the defendant of such force, validity and efficacy that were the defendant to sue the garnishee upon the debt sought to be impounded by the garnishment the production of the judgment against the defendant would be a complete defense. The fact that the garnishee is in default for lack of answer in no wise diminishes this right. Until a valid judgment against the defendant has been obtained the case against the garnishee is not ripe for final adjudication.”

“The judgment against the defendant must exist in such form that it can be ‘looked to’; that is to say, must be subject to inspection, and must not rest solely in the mind of the justice, nor in a mere oral announcement. It must be in such shape that the garnishee can see and know that he will be protected by it; in such shape that he can plead it in

bar against the defendant, if the defendant should thereafter seek to hold him liable on the debt seized by the garnishment.”

“It cannot then be doubted that resort must be had to the docket entry, and to it alone, in order to determine in a given case whether or not there was a valid and lawful judgment.”

Nor can a judgment by default be taken against the garnishee until there has been a final judgment against the principal defendant.

Arnold v. Gullat, 68 Ga. 810.

Berg v. Randall, 189 Ill. A. 627.

Minneapolis etc. Ry. v. Pierce, 103 Minn. 504, 115 N. W. 649.

Atwood v. Tucker, 26 N. D. 622, 145 N. W. 587.

It is further held that the failure to state the amount and fact of judgment against the principal defendant is fatal to the entry of judgment against the garnishee.

Hawarden State Bank v. Hessler, 131 Iowa 691, 109 N. W. 210.

Atwood v. Tucker, 26 N. D. 622, 145 N. W. 587.

Prudential Savings Bank v. Looney, 187 Ala. 19, 65 So. 770.

The only judgment ever entered against the principal defendant was a judgment rendered in the corporation court of the City of Alexandria, in the State of Virginia. It is a settled principle of law that a garnishment will not issue upon the judgment of a sister state, upon jurisdictional grounds.

United States Shipping Board M. F. Corp. v. Hirsh Lumber Co., 59 App. D. C. 116.

Wabash R. Co. v. Tourville, 179 U. S. 322, 45 L. ed 210.

Henry v. Gold Park Mining Co., 15 F. 649.

Shinn v. Zimmerman, 23 N. J. L. 150.

Heyl v. Taylor, 117 N. Y. S. 916.

In the Hirsh Lumber case the garnishment was issued upon the affidavit of attachment, filed with the plaintiff's declaration in debt upon a judgment obtained against the principal defendant therein in Florida. An examination of the docket entries in that case discloses the same entries as in the case at bar. No judgment was obtained against the principal defendant except that the order of the court granting judgment against the garnishee, as in the case at bar, stated the plaintiff's compliance with the requirement of publication against the defendant and that the "plaintiff recover against the defendant's interest in the credits of said defendant." This court held that a garnishment would not lie upon the judgment obtained in Florida and therefore no garnishment could issue in this jurisdiction upon that judgment without first obtaining here a judgment against the principal defendant, which the docket entries, as in the case at bar, did not disclose.

Nor will a garnishment ordinarily issue upon the judgment of a different court in the same jurisdiction, nor in state courts upon the judgments of federal courts.

Wallace v. McConnell, 13 Pet. 136, 10 L. ed. 95.

Rosenstein v. Farr, 51 F. 372.

American Bank v. Rollins, 99 Mass. 313.

Meneer v. Mathews, 197 F. 633.

Henry v. Gold Park Mining Co., *supra*.

Nor does the lack of property in the state where the judgment was obtained give jurisdiction to issue a garnishment upon such judgment.

American Bank v. Snow, 9 R. I. 11.
United States Shipping Board M. F. Corp. v.
Hirsh Lumber Co., *supra*.

In view of the foregoing authorities, it is significant that appellant does not contend there was at the time of the entry of the default judgment against the garnishee, any judgment in the District of Columbia action against the principal defendant, Beck & Gluckert Floral Company. This controlling question as to the existence of the judgment against the principal defendant at or prior to the time when the judgment of condemnation was entered against the garnishee, is not even mentioned in appellant's brief.

It is submitted that this statutory requirement with which appellant failed to comply, before taking a default judgment against the garnishee, is jurisdictional and required the trial court to vacate the default against the garnishee, and that this point alone disposes of the alleged merits of this appeal.

II.

An Order of Court Vacating a Default Judgment, Supported by Adequate Defense to the Merits of the Action, is Not an Appealable Order.

After argument of the motion to vacate on January 8, 1932, the court ordered that the "said motion be and the same is hereby granted and the said judgment of condemnation entered herein on said date against the McCallum-Sauber Co., garnishee, is hereby vacated, set

aside and for naught held.” (R. 13) The notation of appeal from this order was as follows: “From the foregoing order the plaintiff, by its attorney of record in open court, notes an appeal to the Court of Appeals of this District.” (R. 14)

No final judgment existed as a result of the aforesaid order of the court from which an appeal would lie.

Swenk v. Nicholls, 39 App. D. C. 350.

This court has held that orders of a court refusing to set aside judgments or granting or refusing motions for new trials are not appealable orders.

Swenk v. Nicholls, *supra*.

Dante v. Bagby, 39 App. D. C. 516.

Doyle v. District of Columbia, 45 App. D. C. 90.

Phillips v. Moore & Hill, 51 App. D. C. 349.

Fitzgerald v. Dodson, 58 App. D. C. 150.

Capital Traction Co. v. Sneed, 58 App. D. C. 141.

In *Dante v. Bagby, supra*, this court said, at page 517: “It will be observed that the appeal was taken from the order denying the motion to vacate the judgment. Appeal does not lie from such an order.”

Nor are orders overruling motions to dismiss or orders overruling motions to quash service appealable.

Mellon v. Mertz, 58 App. D. C. 302.

O'Brien v. Lashar, 266 F. 215.

Mitchell v. Mason, 4 F. (2d) 705.

Stuart v. Butts, 78 Fla. 657, 83 So. 606.

Starke v. Hunt, 29 Ga. App. 397, 115 S. E. 505.

Eavenson & Sons v. Adelson, 232 Ill. App. 461.

Laramour v. Campbell, 64 Okla. 321, 168 P. 216.

There seems to be no sound reason why the same rule should not apply in cases where the court grants a motion to vacate and set aside a judgment.

Vann v. Union Central Life Ins. Co., 79 Okla. 17,
191 P. 175.

Nelson v. Meehan, 155 F. 1.

The order of the court vacating the default judgment was interlocutory in its nature in that it did not finally determine the action. On the contrary, the finality of the case was set aside and the case set for determination. It is further submitted that the case is not one within Section 226 of the Code, which allows appeals from all interlocutory orders of the Supreme Court of the District of Columbia wherein the possession of property is changed.

In *Trans-Atlantic Trust Co. v. Pagenstrecher*, 53 App. D. C. 42, an order overruling a motion to quash service of process, with leave to the defendant to answer, was held to be an interlocutory order, from which no appeal would lie.

In *Andrews & Co. v. Anchor Folding Box Co.*, 210 Ill. App. 636, the court held that an order vacating a judgment was only an interlocutory order and no appeal would lie therefrom, even though the order was entered at a term subsequent to the term at which the judgment was entered.

It is, therefore, submitted that since the order vacating the judgment was an interlocutory order not within section 226 of the Code and therefore not an appealable order, and since the appeal herein was not taken from any judgment of the court, but from the order granting the motion to vacate and since no appeal will lie from such an order, this appeal should be dismissed.

III.**The Court Properly Considered the Affidavits Filed Relative to the Service of Process and Notice to the Appellee, McCallum-Sauber Co., Garnishee.**

Appellant's contention is that the return of the marshal is conclusive as to the service of the writ of garnishment upon the McCallum-Sauber Co., appellee, and therefore the court committed error in considering the affidavits filed which tended effectively to impeach the verity of the return. In the alternative, the appellant contends that even if the verity rule has been liberalized and is subject to direct attack between the original parties, then the court committed reversible error in holding that the affidavits were sufficient to impeach the return.

The Sauber affidavit and the Conn affidavit disclose that on January 4, 1932, the day after the garnishment was issued against the Security Savings and Commercial Bank, Mr. Sauber and Mr. Conn called upon the deputy marshal, Mr. Roberts, whose signature was endorsed on the return of service, and at that time Mr. Roberts said that he did not know Mr. Sauber nor could he recall ever having seen him before. An aftermath of this occurrence was the affidavit executed by Mr. Roberts upon the solicitation of the appellant that he later examined his records and that he then recalled having gone to the garnishee's place of business about 9 A.M. on the morning of April 4, 1931, and delivered a copy of the interrogatories to a person pointed out to him to be the vice president of the garnishee company, but Mr. Roberts did not and would not state therein that he had ever before seen Mr. Sauber or that he served process upon him. (R. 11)

If it was proper for the court to consider the affidavits, which tended to impeach the verity of the return, it is submitted that it was within the sound discretion of the court to determine whether or not, after such consideration, process had been personally served upon Mr. Sauber.

The specific contention of the appellant is that the court committed error in considering the affidavits, since such a consideration violated the principle of the verity rule. The reason assigned therefor is that the return of the marshal was conclusive upon the fact of personal service and the return was therefore not subject to impeachment.

In support of this contention the appellant cites 21 R. C. L. 1321, wherein it is stated that the party injured by a false return must resort to the remedy provided for at common law by maintaining an action at law for damages against the marshal upon his official bond. The sheriff's return at common law, it is admitted, was subject to a conclusive presumption of actual service, commonly known as the verity rule. Upon this common law presumption does the appellant rely in support of its contention that the court erred in going beyond the return of the deputy marshal to determine whether or not the writ was in fact served upon Mr. Sauber.

By the great weight of authority today it is held that the verity rule at common law is no longer applicable to modern conditions and therefore the common law conclusive presumption as to service is abolished.

Real Silk Hosiery Mills v. Philadelphia Knitting Mills, 46 F. (2d) 25.

Nickerson v. Warren City Tank Co., 223 F. 843, 846.

Fife v. Bohlen, 22 F. 878.
 Hilt v. Heimberger, 235 Ill. 235, 85 N. E. 304.
 Eilson v. McDaniel, 216 Ala. 610, 114 So. 204.
 Lane v. Jones, 94 Mich. 540, 54 N. W. 283.
 Sweeney v. Miner, 88 N. J. L. 361, 95 A. 1014.
 Ferguson v. Crawford, 70 N. Y. 253.
 National Metal Co. v. Green Cons. Copper Co.,
 11 Ariz. 108, 89 P. 535.
 Jordan v. McKenzie, 199 N. C. 750, 155 S. E.
 868.

No adjudication upon this question is to be found in the District of Columbia, except *Hazel v. Waters*, 3 Cr. C. C. 420, where the question was raised but not determined. Some doubt was there entertained, but it is to be noted that the attempted traverse of the return in the Waters case was in a separate and collateral action, which, according to the more recent authorities differs from a direct attack upon the service in the same action.

The United States Supreme Court accepted the verity rule in *Miedreich v. Lauenstein*, 232 U. S. 236, 58 L. Ed., 584, in a situation where the rights of a third person had intervened. The case is properly to be understood as accepting the verity rule only to protect the rights of a third person who acts with reliance upon the return. Numerous courts abolishing the verity rule, however, still invoke it when the rights of third persons are involved, as in *Miedreich v. Lauenstein*.

Hilt v. Heimberger, 235 Ill. 235, 85 N. E. 304.
 Nuttallburg Fuel Co. v. First National Bank, 89
 W. Va. 438, 109 S. E. 766.

The departure from the verity rule is clearly expressed in *Johnson v. Gregory & Co.*, 4 Wash. 109, 39 P. 831, where the court said:

“the great weight at least of modern authority sustains the view that the return of the officer may be assailed in a direct proceeding to set aside the judgment, in addition to the defendant’s right to proceed against the officer for damages. And this view of the law appeals to our judgment as being founded on the better reasoning. No doubt hardships will arise under such a construction of the law, and public policy demands that evidence should be given to the record; but prudential considerations of public policy should not be carried to the extent of establishing conclusive presumptions which destroy the citizen’s constitutional right to his day in court.”

In *Crosby v. Farmer*, 39 Minn. 305, 40 N. W. 71, the court said:

“The rule of the English Common law is that, as between the parties to the process or their privies, the sheriff’s return is conclusive, and that the court will not try the truth of it on a motion to set aside the proceedings, or allow any averment to be taken against it in pleading.”

“If the officer makes a mistake, why should the defendant be compelled to allow the judgment against him to stand, and resort to his suit against the officer, instead of being permitted to apply in a direct proceeding on the action to set aside the false return? We can see no good reason why the plaintiff should have a sum of money to which he is not entitled, and the officer he compelled to pay to the defendant a like sum for making what might have been an honest mistake. If somebody must suffer loss for the mistake, it is right that it should fall on him who made it; but, if discovered in time to prevent loss to anyone, why should not the mistake be corrected on motion? There are very good reasons why the return of a ministerial officer should be held conclusive in all col-

lateral proceedings, but we can see none, either upon principle or considerations of public policy, why it may not be impeached for falsity in direct proceedings in the action; assuming always, of course, that no rights of third persons have intervened * * * Upon a motion made in the action to vacate a judgment by default on the ground of no service of the summons, the return of the officer may be impeached by affidavits, as was done in this case."

After thoroughly investigating the decisions of West Virginia which accepted the verity rule, the Supreme Court of that state in *Nutallburg Smokeless Fuel Co. v. First National Bank*, *supra*, expressly overrules its earlier decisions as not conforming to modern conditions. In the course of a very exhaustive opinion and review of the authorities the court said:

"The reason for the rule given in our decisions does not seem to have been examined at length. They recognize it as a harsh rule, but it is said, its harshness is 'off set by the great inconvenience that would arise from uncertainty of judicial judgments and decrees.' *Milling Co. v. Read*, 76 W. Va. 569, 85 S. E. 731. In *Stewart v. Stewart*, *supra*, it is stated that others besides the defendants are interested that the return should be regarded as true; that rights of property would suffer under any other rule; and that sufficient protection to the injured is conserved by right of action against the officer for false return. In that case the rights of others had intervened. It is asserted there that the rule at common law should be followed, and if it is thought wise to charge the rule, the legislature should furnish the remedy. The evils and great inconvenience which would arise from the uncertainty of judicial judgments and decrees seems to be more imaginative than

real. Experience, the great practical test, has demonstrated that no harm to the stability and certainty of judgments and decrees has resulted in the jurisdictions where the common law rule of verity in the return has been abolished. On the contrary, we hear no challenge or outcry for that reason, or for any other reasons, from the 34 states which have either abolished or modified the verity rule, and the bench and bar of those states seem to be well satisfied. This rule is a heritage from ancient English law, formulated in times and under conditions which have very little resemblance to modern times and affairs; and, like a great many other ancient rules, has been meeting with disapproval in the transition of modern progressive jurisprudence. It has been abandoned by the courts in 21 of the states, by the federal courts, abolished by legislation in six others, and modified materially by the courts in seven other states, eight states including West Virginia yet retain it. Another reason for the rule, not stressed by our decisions, is that the sheriff is a sworn officer to whom the law gives credit, and that he and his bondsman are liable for damages caused by a false return. It seems somewhat anomalous, in present day affairs, that the law should give more credit to a statement of the sworn officer in his return than it does in the suit against him for damages for sale return * * *. The remedy of the bond is a confession on the weakness of the verity rule; for it is an admission that the officer might make a false return; that he is not made infallible by being selected and sworn as an officer * * *. As stated, the courts in the majority of the states have abolished the rule of verity as not consonant with modern procedure, and now permit a direct attack in the same court where the process is returned in the same action, or by procedure to vacate the judgment."

In the stead of the verity rule it is accepted that the return of a sheriff or marshal is only *prima facie* evidence of service.

Crowley v. Neal, 152 Ark. 232, 238 S. W. 1054.

Butts v. Francis, 4 Conn. 424.

Sweeney v. Miner, 88 N. J. L. 361, 95 A. 1014.

Pfotenhauer v. Brooker, 101 N. Y. S. 762.

The presumption of proper service upon the marshal's return is subject to impeachment, even in the absence of fraud on the part of the plaintiff.

Owens v. Ranstead, 22 Ill. 161.

National Metal Co. v. Green Cons. Copper Co.,
11 Ariz. 108, 89 P. 535.

No objection appears to applying the same rule to a proceeding *quasi in rem* such as a garnishment proceeding. Garnishment is a dual proceeding, moving against the garnishee in personam to disclose his property or credits belonging to the judgment debtor and against the property and credits themselves, to extinguish the judgment debtor's right therein. For purposes of jurisdiction personal service, as in ordinary *in personam* actions, is required. Where the garnishee in fact has neither property nor credits in his possession it will be presumed in law that he is in the possession of a *res* in the same amount as the judgment against the principal defendant. This presumption in cases of default in no way impairs the garnishee's right to personal service. There being no *res* except a fictitious one in contemplation of law, the element of personal service would seem to be required with ever greater force.

Extrinsic evidence is admissible to impeach a marshal's return. Circumstances surrounding the default are properly to be considered by the court.

Mann v. Meryash, 107 N. Y. S. 599.

Lunschen v. Peterson, 120 Minn. 288, 139 N. W. 506.

Buck v. Hawley, 129 Iowa 406, 105 N. W. 688.

The court had the power to wholly refuse to consider the affidavit of the deputy marshal.

Pinnacle Gold Min. Co. v. Popst, 54 Colo. 451, 131 P. 413.

Bates v. Goode (Okl.), 281 P. 558.

Pettis v. Johnston, 78 Okla. 277, 190 P. 681.

Service of process upon the McCallum-Sauber Co. was required to be upon an officer, the company being a domestic corporation. The jurisdiction of the court to enter a judgment against the company therefore depended upon the fact of personal service. According to the affidavits and oral hearing thereon the court in the proper exercise of its discretion could properly accept the affidavits in determining the preliminary fact of service. As stated by Pound, C., in *Baldwin v. Burt*, 2 Neb. (Unoff.) 377:

“To say that a party not served in fact is bound in any way by a recital of service which derives its force solely from the power of the court which is acquired by the service, is to reason in a circle.”

Appellant admits on page 10 of its brief that from its standpoint it “can find no decided cases binding on this court establishing the effect to be given to such a return.”

IV.

**The Failure of the Appellee, McCallum-Sauber Co., to
File a Memorandum of Authorities in Support of
the Motion to Vacate Does Not Constitute Rever-
sible Error.**

The record does not contain the memorandum of Points and Authorities filed by appellant in opposition to appellee's Motion to Vacate the Default Judgment, but merely contains a memorandum that plaintiff did file a memorandum in opposition to the Motion to Vacate the Judgment against the garnishee. (R. 11)

It therefore does not appear from the record in this case that appellant did raise any objection in the lower court to the granting of appellee's motion to vacate on the specific ground that appellee had failed to support its motion with a paper containing Points and Authorities; and inasmuch as appellant has gone out of the record to raise this objection, appellee states that an examination of appellant's memorandum, filed in the lower court, will show that although it contained five separate objections, it failed to specify this ground as any one of them.

Had proper objection to the mere formal requirements of the motion been made at the time the appellant filed its memorandum, the appellee could and would have supplied the formal memorandum. Having failed to so object at that time, it is submitted that the appellant's right to the memorandum of points and authorities was effectively waived.

The separate paper or memorandum of points or specific propositions of law referred to in Law Rule 32 is no part of the pleading in any case. Its apparent purpose is to supply, principally for the court and also

for opposing counsel some reference to the points to be raised upon the argument of the motion. However, it is further important in this regard to note that, since such a memorandum is not a part of the pleadings, a party filing such memorandum is neither constrained nor limited in his argument to the points and authorities stated therein.

The appellee's motion to vacate as filed (R. 8), if retyped and headed "Points and Authorities in Support of Motion To Vacate Judgment", would literally, and for all practical purposes, have complied with the rule. The grounds stated in the motion further gave notice to the court and to counsel for the appellant that the lack of notice to the garnishee and the error apparent upon the face of the record, herein specifically argued, were the points to be raised upon the argument. In the last analysis, it is submitted, the question is one within the sound discretion of the Motions Justice when the objection is timely and properly presented. No such timely or proper objection was made by the appellant in the case at bar.

CONCLUSION.

It is, therefore, respectfully submitted, that since the order appealed from is interlocutory in its nature no appeal will lie therefrom. However, should this court consider the case upon its merits, it is respectfully submitted that the trial court did not commit error in vacating the judgment of condemnation against the appellee, McCallum-Sauber Co., garnishee, because that judgment of condemnation was void in that the statutory requirement of a primary judgment against the principal defendant was not complied with, and further, in the proper exercise of its discretion, the trial

court had the power to inquire into and determine the existence of the jurisdictional prerequisites for the entry of judgment against the McCallum-Sauber Co., and having found against the appellant thereon, properly vacated the said judgment with leave to the appellee to answer the interrogatories.

Accordingly, it is submitted that the order of the trial court should be affirmed.

Respectfully submitted,

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